

Juridical ontology: the evolution of legal form

Deakin, Simon

Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Zur Verfügung gestellt in Kooperation mit / provided in cooperation with:

GESIS - Leibniz-Institut für Sozialwissenschaften

Empfohlene Zitierung / Suggested Citation:

Deakin, S. (2015). Juridical ontology: the evolution of legal form. *Historical Social Research*, 40(1), 170-184. <https://doi.org/10.12759/hsr.40.2015.1.170-184>

Nutzungsbedingungen:

Dieser Text wird unter einer CC BY Lizenz (Namensnennung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier: <https://creativecommons.org/licenses/by/4.0/deed.de>

Terms of use:

This document is made available under a CC BY Licence (Attribution). For more Information see: <https://creativecommons.org/licenses/by/4.0>

Juridical Ontology: The Evolution of Legal Form

Simon Deakin *

Abstract: »Juristische Ontologie: Die Evolution der Rechtsform«. Juridical concepts – specialized terms used in legal reasoning – have adaptive properties which allow for their coevolution with the social relations that they describe and constitute. Concepts form a bridge between empirical facts and legal norms. As such they allow data about the social world to enter legal discourse and frame normative judgments. Their defeasibility allows them to adjust to changes in their social and economic context. Studying juridical concepts in their historical context opens up new perspectives on institutional change and contributes to our understanding of social reality.

Keywords: Social ontology, legal evolution, systems theory, conventions, employment norms.

1. Introduction

Law in action and the norms of law are not two independent spheres of existence, but different sides of one and the same reality.
(Ross 1959, 19).

Juridical concepts are specialized terms used in legal reasoning. Examples include “property,” “contract,” “company” and “employee.” These terms have distinctive legal meanings, which are separate from the senses ascribed to them in everyday usage and in the social science disciplines. What is their ontological status? What did Ross mean when he described “norms of law,” that is law in the text, and “law in action,” that is law operating in its social context, as complementary aspects of the same “reality” (Ross 1959, 19)?

This article will argue that juridical concepts should, indeed, be understood as part of social reality. They are the product of human minds, and hence depend upon human actors’ subjective perceptions and understandings of the social world, but they exist independently of any individual actor’s intention or will. As such their objective existence can be verified using procedures which are appropriate for validating empirical claims about the social world.

A second, related, claim is that studying juridical concepts can tell us something about the social world beyond the juridical realm. In other words, the

* Simon Deakin, University of Cambridge, The Faculty of Law, 10 West Road, Cambridge CB3 9DZ, United Kingdom; s.deakin@cbr.cam.ac.uk.

analysis of legal concepts is not a purely internal legal exercise. Legal language and practices are a distinct part of social reality, but they are not unrelated to other dimensions of society. Thus studying juridical concepts using the techniques of legal analysis will inform us about the nature of social practices beyond the legal text, for example in transactional or organizational contexts. Exactly what it tells us, and how, need to be precisely specified. Legal forms do not have a one-to-one correspondence with social practices beyond the legal system, but they do co-exist with and evolve alongside them. This co-evolutionary dynamic can be empirically studied, and the role of law in shaping economic and social relations over time brought into the open.

Section 2 outlines the form of juridical concepts and the function they play, within legal reasoning, of linking empirical data from the social world to deontic or normative propositions embedded in legal rules. Section 3 takes a closer look at legal evolution and explains how the study of legal concepts in an historical perspective can be used to throw light on social structures beyond the text. This involves a consideration of the dual character of the legal system as, at one and the same time, separated from society, and embedded in it. Section 4 illustrates the argument through a case study which looks at the evolution of legal concepts relating to the employment relationship in a number of national contexts. Section 5 considers the significance of the analysis of legal concepts for the resolution of current debates in the theory of social reality.

2. Form and Function of Juridical Concepts

A juridical concept is a linguistic form used for specifying the conditions for the application of a legal rule which takes the form “in C, if X than Y,” as in, “in the context of a work relationship, if X is an employee, he may not be unfairly dismissed.” Several concepts are embedded in the rule: the terms “employee,” “unfairly” and “dismissed” all have to be unpacked. An “employee” is a category of worker, “dismissed” refers to termination of the relationship by the employer, and “unfair” refers to the procedural and substantive context of that termination. In the contemporary labour law systems of industrial market economies these are all terms of art whose meaning depends on interpretation of a mass of legal materials including voluminous reports of decided cases and extensive statutory texts.

It might be thought that the concepts themselves add relatively little to the content of the rule. The concept “employee” could just be shorthand for saying, in a certain context, “if a person agrees to work for another for regular remuneration he is entitled to be treated fairly before that other ends their relationship.” The concept is an intermediating link or bridge between a set of factual preconditions, on the one hand, and certain normative or deontic conclusions, on the other. It can be said to represent or condense a good deal of otherwise

unwieldy information, but without adding anything of its own. This was Ross's view: the concept is "inserted between the conditioning facts and the conditioned consequences" solely as "a means of presentation." It is "in reality a meaningless word without any semantic reference whatsoever" (Ross 1957).

The idea that concepts serve to condense complex information certainly captures part of their function within legal reasoning. The empirical preconditions for the application of the concept "employee" are notoriously complex. The English courts, for example, apply a "multi-factor" test under which numerous features of working relationships are potentially relevant to employee status, without any of them being conclusive: is work regular or intermittent, who determines how the work is to be done, who owns the tools or equipment needed to do the work, what form does the remuneration take, who takes the surplus from production, and so on. The normative consequences of employee status are also complex: the worker's right to receive the minimum wage, join a trade union, access social security benefits, and so on, are all affected by the legal classification of the work relationship, as are certain liabilities, for example those relating to the incidence of income tax. Various subcategories ("fixed-term employee"), satellite concepts ("agency worker") and even a higher-level, "genus" form ("worker") have recently appeared as a response to the weight that the idea of the employee has to carry (Deakin and Morris 2012, ch. 3). Although this fragmentation and multiplication of concepts gives rise to problems of its own, it is likely that the law governing employment would be even more chaotic and disorganized than it is often claimed to be, if it lacked this extensive conceptual infrastructure. Jurists who are critical of the role of the contract of employment as the core idea of contemporary labour law systems tend to call for its replacement by or evolution into a more useful concept (Hepple 1986; Freedland and Kountouris 2011), not for the complete elimination of conceptual ordering.

Ross's point was that, after allowing for the representational effects of concepts, we should not ascribe independent causal powers to them. In particular, we should be very cautious to accept that concepts, in themselves, determine the content of rules or the conditions for their application. Such caution is undoubtedly justified. However, as Giovanni Sartor has argued, Ross's view is excessively reductive. This is for a number of reasons.

Firstly, concepts acquire inferential meaning from the prior conditions for and subsequent effects of their application, but also create meaning by virtue of the role they play in integrating empirical and normative data. Thus the definition of the prior conditions for the application of a rule can never be entirely separate from the consequences of applying it: there is "a feedback circle involved in construing legal norms, connecting assignment of a meaning to a term and a teleological interpretation of the norms including that term" (Sartor 2009, 27). Thus the normative context in which a rule is applied is unavoidably taken into account when the prior conditions for its application are being con-

sidered. The factors which determine the personal scope of employment law are not derived only from the abstract definition of the term “employee” but also from the concrete effects of applying certain legal rights and obligations to particular types of work relationship. This often leads to the circular, or at any rate, non-linear reasoning which characterizes attempts to define complex legal forms: the empirical observation that an employee is a person under the “control” of another is used to draw the normative conclusion that a person in the position of an employee is under a duty to obey the reasonable and lawful orders of their employer.

Secondly, concepts frame the possibilities of legal interpretation by virtue of the taxonomical order in which they are arranged (Sartor 2009, 19). Concepts are linked to each other through subdivision and fragmentation, with subcategories and satellites expressing exceptions from or variations of originating or “foundational” terms. Conceptual meanings are derived at least in part from the positions of particular terms within the overall taxonomical order. For example, it is possible to refer back to a more foundational concept if the conditions for the application of a rule cannot be satisfactorily identified at the more concrete level of a subcategory. Thus the category “employment” is itself a subcategory of the term “contract,” which in turn refers back to an even more foundational concept, “person.” Because of this derivation, principles derived, remotely, from the law of persons, and, somewhat more proximately, the law of contract flow into employment law, while decisions on employment cases flow back in the opposite direction, influencing the “general part” of the law of contractual obligations. The process is not necessarily deliberate or even conscious at the level of individual legal acts, such as the publication of a ruling or the formulation of a statutory formula; it becomes visible over the course of time and in respect of a sufficiently large sample of juridical texts. The effects are mixed. In some contexts, contract law, with its emphasis on the autonomy of the parties, has been used to frustrate the application of protective labour standards; in others, the regulatory influence of labour legislation has infiltrated the contractual core of the employment relationship, stimulating the development of new norms of mutual trust and confidence.

Thirdly, concepts assist the process of legal interpretation through their open-endedness or “defeasibility” (Sartor 2009, 28). Concepts are useful tools precisely because of their incompleteness and openness to new applications. A complete specification of the preconditions for the application of the “employee” concept in all relevant contexts is impossible. This element of indeterminacy is often seen as a problem, and in so far as it creates uncertainty in the practical operation of the law, it undoubtedly is. The converse of this lack of precision, however, is the mutability of the idea of the contract of employment and its potential for transformation. The legal form of the work relationship in English law has been reinvented several times over the past two centuries and the current model is an amalgam of several prototypes from earlier periods;

other western European and North American legal systems have experienced a similar process. Legal concepts are anything but fixed. But how, more precisely have they managed to adapt to the changing economic and political contexts of industrial societies?

3. Legal Evolution: System, Convention and Norm

Because they serve as a bridge between facts and norms, legal concepts are continuously open to empirical data. Nevertheless, the reception into the legal system of data from the social realm beyond the legal text involves a process of translation. This insight, which is at the core of the systemic view of law associated with Niklas Luhmann (1984, 1993) and Gunther Teubner (1989) is often understood as generating a theory of “closed systems,” which is indeed one of the aspects most stressed by its authors. However, autopoiesis, or self-reference, is only one part of the theory; the other is the capacity of systems to evolve by reference to their environment. The legal system is simultaneously closed and open, that is closed at the level of its internal operation, which consists of recursive self-reference, but open at the level of its co-evolution with and adjustment to other social sub-systems.

The ontology of systems theory is both naturalistic and constructionist (on these categories, see Searle 1995, 2010; Lawson 2014). It is naturalistic in so far as it conceives of the social realm as a context governed by “laws” in the descriptive sense, that is, regularities, which are consistent with the laws governing living forms in the natural realm. The social realm is a subset of the natural one; there can be no society, no realm defined by human interaction, without the existence of human beings who are, first and foremost, physical entities, that is to say, psychic or biological systems in their own right. The “laws of form” which determine the structure of living systems have their equivalent in regularities which frame the structure of society. The task of the human and social sciences, in identifying and unravelling these regularities, is no more or less “scientific” than the project of natural science disciplines such as molecular biology or population genetics. In both cases, there is an external “world” to be mapped and analysed using relevant techniques of inquiry.

However, the social realm is not reducible to the natural one. The working hypothesis of systems theory is that the societal “laws of form” bear a family resemblance to, but are not identical with, those found in the natural realm. Biological concepts, such as self-reference, inheritance, mutation, and so on, are useful starting points for the theory of social systems, but are not unaffected by the process of their application to societal data. This is perhaps the problem with the idea of the “meme,” which has been proposed as a fundamental unit of cultural selection by analogy with the gene in natural selection. There is nothing wrong in principle with the idea of drawing analogies from the natural

sciences for the purposes of theorizing the human and social ones, but proponents of the meme are looking in the wrong place when they associate the meme with psychic or neurological systems. If genes have their equivalents in the cultural sphere, they are to be found at the level of phenomena such as conventions, institutions and norms which express elements of a distinctively social structure (Deakin 2003).

According to the theory of social systems, if the natural realm consists of “matter” in the form of quarks, atoms, genes, proteins, and so on, the social realm consists of “communication.” To put it this way seems deeply counter-intuitive; does society not consist at least of individuals and possibly, through their mutual interaction, of enduring institutions? Of course, “communication” cannot exist without human beings to do it, and it is their behaviour which constitutes “communicative action.” However, the two sets “communication” and “behaviour” are not identical. There are aspects of human behaviour which are rooted in physical, for example genetic causes, and there are aspects which are social in origin. It is the study of the specifically communicative dimension of human behaviour with which the social sciences are concerned. This is an important methodological move as it helps the social sciences to avoid the excessively reductive strategies of fields such as “sociobiology” and “neuroeconomics,” which attempt to offer all-encompassing naturalistic explanations for societal phenomena. Systems theory can perfectly well accommodate the existence of a natural, biological substrate to society, while proceeding on the basis that social structures have emerged out of, and hence are distinct from, that material base.

Conversely, communication can take non-behavioural forms. Data can be communicated through human speech and through non-verbal behaviour, but they can also be embedded in physical objects (such as a traffic light or a bank-note) and in texts (such as legal judgments and statutes). Complex texts “script-code” behavioural regularities (Deakin and Carvalho 2011). These texts are not free-standing; they would not exist were there no human beings to make them, whether directly or at one remove through technologies of various kinds. However, organized texts, such as those of the legal system, display features which are not reducible to the psychic or behavioural strategies of the human beings who are their authors. In particular, texts have their own laws of form, that is, their own evolutionary tendencies. This entails a second important methodological move: systems theory invites us to study both behaviour and text, “the world” and “the word,” and the links between them, in an evolutionary, that is to say, historical, perspective.

It follows that the social reality assumed by systems theory is a “constructed” one: it is the result of multiple discursive practices, each of which is self-reproducing, and which are constantly coevolving by reference to one another. The view of the social world constructed through legal discourse is distinct from the perspective of the economic or political system. A term such as “con-

tract” acquires its legal meaning from the place of contract within the taxonomical structures of juridical thought, which are unique to legal reasoning. There is no precise match with the same term in economic discourse or in everyday language. Furthermore, there is no single, overriding social category of “contract” to which the different discursive practices of the separate social systems have to conform or from which they can be said to originate. There are only multiple, overlapping and continuously mutating discursive forms.

It does not follow from the communicative nature of social reality that there is no external world beyond the text. The text *is* the social world, but, importantly, *only one part of it*. Thus the study of linguistic structures, their pre-suppositions and commitments is one aspect, but only one, of social science method. Communicative data is embedded in texts, but also in routines, conventions and norms which operate at the intersection of language and behaviour, and in physical objects which perform a communicative function.

Nor does the “closure” of the various social sub-systems carry the implication that there are no points of correspondence between them. Legal concepts are separated from other dimensions of the social realm by the autopoietic closure of the legal system at the point of its self-reproduction. Legal concepts refer to other concepts, legal rules to other rules, and so on. This is a feature of law’s autonomy, of the neutral “rule of law” which is a core feature of modern liberal-democratic polities. But this “operational closure” is counterbalanced by the system’s “cognitive openness,” that is, its capacity to absorb signals from its external environment and to translate them into the terms of its own operation. Put more concretely, concepts in the legal system will be more or less successfully aligned with their referents in the economic realm, for example, to the extent that they can translate the transactional logic of economic relations into terms present in juridical language.

It is this tension between openness and closure which drives legal evolution. This process can be understood through the operation of a “variation, selection, retention” algorithm which has points of correspondence with the same process in the evolution of living systems. On the one hand, conceptual categories, expressed through taxonomies which are often quite rigid and unbending, provide the skeleton frame or infrastructure which prevents the mass of individuated norms dissolving into chaos. In evolutionary terms, they provide the basis for the “retention” or “inheritance” of forms which has its biological equivalent in the inter-generational transmission of genetic structures. On the other, concepts provide the gateway for empirical data to enter the legal system. They condense or code information about the social realm beyond the text, in such a way that makes it possible for these empirical data to influence the content of legal rules. In this way, mutation or variation of legal rules is possible. Selection of rules, reflecting pressures from the external environment for rules which are more or less functional in given social settings, is internalized through the same distinct forms of juridical reasoning: legal rules persist not simply be-

cause they “fit” with external environment parameters, but according to how far they operate consistently with the internal categories of legal analysis.

It follows that we should not expect legal evolution to produce rules which are optimal for a given set of external economic or political conditions. The law cannot be completely open to its environment, since that would imply the dissolution of the system itself. While the preservation of a self-reproducing system might not seem to offer any advantage to society in terms of its broader functionality or fitness, the point is that a social world without such boundaries would be informationally impoverished. The autonomy of the legal system is the functional precondition for the preservation of the applied information (“knowledge”) embedded in it. This information is useful, possibly essential, for achieving social coordination in an otherwise endlessly uncertain and contingent world.

But it is also clear that the legal system can be expected both to respond at some level to changes in its context, and to initiate them. The law, then, is *partially endogenous* to economic and political change. It can be both the independent and the dependent variable. On the one hand, regularities which begin in a transactional or organizational context can find their way into the legal system. Conventions which are based on shared knowledge among a population of actors can emerge on the basis of repeated interactions between them (Lewis 1969). The law may adopt the content of conventions: “general clauses” in contract law provide a portal for commercial practice to enter legal discourse (Teubner 1989). Conversely, the law may seek to trigger social change by altering the basis of conventional behaviour. The phenomena of “information cascades” (Bikchandani et al. 1992) and “bargaining in the shadow of the law” (Mnookin and Kornhauser 1979) are examples of this type of interaction between laws and conventions. Social norms may impart a sense of duty or obligation independently of the presence of legal sanctions, but their successful operation frequently depends on the possibility of legal sanctions being available, for example at the apex of a “pyramid of enforcement” (Ayres and Braithwaite 1992). This type of “responsive” or “reflexive” law can be conjoined with private ordering without losing its unique public-regulatory character.

4. Case Study: The Coevolution of Labour Market Conventions and Legal Norms in Western Europe

In the early nineteenth century, juridical forms underwent a rapid evolution in response to the rise of waged labour and the decline of guild forms of work organization. In the civilian systems of France and Germany, the process was marked by the assimilation of the work relationship to the contractual categories set out in the civil codes. The drafters of the *Code Civil* of 1804 adapted the Roman law concept of the hire of work or *locatio conductio* to indicate the consensual nature of the wage-work bargain, in contrast to status-based catego-

ries associated with pre-revolutionary law. The term *Arbeitskraft* or “labour power,” which identified the sale of the capacity to work as the essence of the transaction between worker and employer, owed its origins to juridical debates in Germany in this period, prior to its use in Marx’s political economy writings of the 1840s (Simitis 2000).

The *Code Civil* adopted a binary definition of the work relationship, according to which the Roman law concept of the *locatio conductio operarum* was mapped on to the category of the *louage de services* (“hire of labour services”) and the *locatio conductio operis* aligned with the *louage d’ouvrage* (“hire of completed work”). The German civil code of 1896, the *Bürgerliches Gesetzbuch*, drawing on earlier German codes which themselves borrowed from the *Code civil*, adopted a similar distinction between the *Dienstvertrag* (“contract for service”) and *Werkvertrag* (“contract for work”). In the English common law of the nineteenth century, apparently the same classification can be found between servants employed under a “contract of service” and independent contractors working under a “contract for services.”

These distinctions appear at first sight to correspond to the modern division, found in all contemporary labour law systems in some form or another, between employees in a relationship of subordination to an employer, on the one hand, and self-employed or independent workers, on the other. The Roman law origin of the distinction between the two forms of the *locatio* gives the impression that this division, along with the different market-based versions of the wage-labour relationship to which it appears to correspond, is of very long, indeed ancient, standing. However, a number of historical and comparative studies have shown that this impression is misleading (Veneziani 1986; Supiot 1995; Mansfield, Salais and Whiteside 1994; Deakin 1996, 2001; Simitis 2000; Mückenberger and Supiot 2000; Cottureau 2000, 2002; Didry 2002; Sims 2002; Petit and Sauze 2004; Le Roux 2009). Although the classifications adopted in the nineteenth century share some of the same terminology as those used in Roman law and also in today’s legal categories, the various classificatory schemes performed entirely different functions for the labour markets of their day. There were also significant cross-national differences, so that apparently identical terms (allowing for translation) had distinct roles according to their use in a given legal system.

The use of the Roman categories of the *locatio* in the *Code Civil* was nominal only (Veneziani 1986). Their use was primarily ideological; it was intended to convey the sense that work relations under the new code would be characterized by formal contractual equality. Around the same time as the adoption of the Code, however, the French legislature had adopted a set of regulatory laws which envisaged the work relationship as a hierarchical one, the essence of which was the worker’s subjection to the power of the employer. The *Loi germinale* of 1803 imposed criminal sanctions on organizations of workers (*ouvriers*) and instituted the *livret* or workbook system to control labour mobil-

ity (Cottureau 2002). In this way, the same work relationship could be characterized in two completely different ways by the same legal system: one based on freedom of contract and exchange of commodities, the other reinventing status relations in a new, disciplinary form.

The same mingling of legal forms is visible in English law of the same period. On the one hand, the relationship of “master and servant” was a contractual one, constituted by an exchange of promises. On the other, the status of servant was defined by legislation which made it a criminal offence, punishable by fines or imprisonment, for the servant to commit an act of indiscipline or quit work without giving the agreed notice. “Servants” in this specific statutory sense were not domestic workers (they occupied a separate, non-statutory category), but waged workers in a range of specific agricultural and manufacturing trades. These laws were strengthened and made more punitive in the period of the transition to a largely industrial economy in the century after 1750 (Hay and Craven 2004; Deakin and Wilkinson 2005).

In the early decades of the nineteenth century, “employees” were higher status workers outside the personal scope of the master-servant laws, such as journalists, teachers and managers of industrial enterprises. Thus at this point, the terms “servant” and “employee” described two different types of waged or salaried workers (Deakin 2001). The association of the term “employee” with all categories of wage or salary-dependent work was a much later development. A similar adaptation of forms is visible in both French and German law. Wage-dependent workers could be found on either side of the formal divide between the *louage d’ouvrage* and the *louage de services* (Petit and Sauze 2004), while the *Dienstvertrag* concept covered both wage-dependent workers and independent contractors (Sims 2002) at the end of the nineteenth century.

The fragmentation and conceptual fluidity of labour laws at this point reflects industrial societies which were still in the process of formation. Although wage labour was becoming more common in all systems, there were wide variations at industry level and across countries in the way labour was contracted. A direct employment nexus between the worker and the employing enterprise was unusual in many British manufacturing sectors as late as the early twentieth century. Instead, it was normal for labour to be supplied indirectly through contractors or intermediaries. In Germany and France, direct employment became the norm at an earlier stage (Biernacki 1995; Didry 2002).

The appearance of the “contract of employment” as a juridical form can be traced to the period when vertical integration of production in industrial enterprises became well established. In France and Germany this was at the end of the nineteenth century but in Britain the legal watershed came later, in the middle decades of the twentieth century (Deakin 2006). A second factor in the emergence of the contract of employment was the development of mechanisms for worker protection, in the form of collective bargaining, workplace health and safety legislation, and social insurance (Mansfield et al. 1994; Didry 2002).

In France, the term *contrat du travail* was first used in the 1880s to describe work relationships regulated by the social legislation of that time (Cottureau 2002). The adoption of this new model in place of forms based on the *locatio* had a dual significance: for employers it formalized their powers of unilateral direction and control, while for trade unions it was an indication of the increasing regularization and stabilization of wage labour. In Germany, the emergence of the *Arbeitsvertrag* is associated with the social legislation of the Weimar Republic. In Britain, the 1870s saw the removal of criminal sanctions against workers and the mutation of the “servant” into the “workman” in the context of workmen’s compensation legislation. However, it was not until post-1945 reforms to social insurance and employment protection law that the formerly distinct concepts of “servant,” “workman” and “employee” were fused into the single category of the “contract of employment” (Deakin 1996).

A conceptual case study such as this suggests a number of things. The first is that concepts are *mutable*. They adjust to changes in the economic and political environment of the law. The mutations which gave rise to the emergence of the employment contract as the core concept of modern labour law systems took place against the backdrop of changes in organizational practices, which saw the rise of the vertically integrated industrial enterprise, and the related growth of worker self-organization through trade unions. Ideology and politics also played a role, as the influence of working class political parties, itself the result of the extension of the democratic franchise, was reflected in the adoption of workmen’s compensation and social insurance legislation. Changes in the taxonomical structure of labour law reflected these changes (Deakin 2006).

A second point is that concepts are *multi-functional*. The developed form of the contract of employment in advanced industrial societies performs two distinct tasks: on the one hand it provides a legal form for the exercise of managerial power within the framework of the enterprise while, on the other, it provides the worker with access to insurance against labour market risks and the right to organize (Deakin 2001). In a more internal, juridical sense, the employment contract is both a source of regulatory norms for the employment relationship, and a basis for the classification of different forms of wage labour.

A third point is that concepts are *transferable* across different contexts. In English law, the concept of the “servant” which was used in the context of the disciplinary master-servant law of the late eighteenth and early nineteenth centuries was later adopted in the context of worker-protective health and safety laws, while the notion of the “employee,” which initially described “high-status” work relationships characterized by a certain degree of professional autonomy for the worker, later came to describe all wage-dependent work relationships. Thus concepts can alter their function, and underpin rules of very different types, while retaining their basic form (Deakin 2001).

A fourth point is that conceptual change is *path-dependent*. The law displays a high degree of conceptual continuity, even or perhaps especially at the point

where a significant mutation occurs. The retrieval of the ancient Roman law form of the *locatio* in the civilian codes of the nineteenth century is just one of the more extreme examples of this tendency (Veneziani 1986). At the end of the same century, the novelty of the idea of the *contrat de travail* was masked by attempts to show that it was the descendant of the *louage d'ouvrage* (Cottereau 2002). The process which saw the “servant” evolve into the “workman” and then the “employee” in English law is another example of the tendency to invoke the past in order to justify innovation. This tendency is not without its costs: present taxonomies are never entirely free of the effects of past classifications, including the normative connotations they carry with them. Thus the preservation of elements of the “servant” concept in the modern English common law played a part in delaying the courts’ acceptance of norms of mutual trust and confidence as the core of the contract of employment (Brodie 1996).

5. The Ontological Status of Legal Forms

We are now in a position to return to the question we posed at the outset: what is the ontological status of juridical concepts? The systemic-evolutionary view of the legal system presented in this article is consistent with a view of social reality as constituted by the collective practices, including behavioural regularities, conventions and social norms, but also more formally structured institutions such as the legal system, which make it possible for individuals to coordinate their actions. It is because such practices are, to a greater or lesser degree, effective in achieving societal coordination that, as Tony Lawson puts it, “their reality is established,” and because they are “irreducible to the individuals” which they organize that it is possible to envisage a distinctive domain of the social and human sciences devoted to their study (Lawson 2014).

There are three specific ways in which legal concepts operate as distinct elements within social structure.

The first relates to the domain-specific operation of the legal system. The idea that abstract concepts might determine the content of legal rules, and thereby shape the outcomes of legal acts such as adjudication and legislation, has had many detractors. The idea that legal form, to the exclusion of policy or ideology on the one hand or economic circumstances on the other, is responsible for the substance of legal rules in a contested field such as labour law, is indeed a difficult proposition to defend. However, a completely defensible proposition is that legal concepts shape the path of the law and so at least partially influence the content of legal rules. The conceptual architecture of juridical thought both facilitates and constrains legislation intended to give effect to social and economic policy.

Juridical forms are not, however, limited to their place within legal reasoning. Thus a second dimension to their operation relates to the role they play in

constituting social relationships beyond the legal system. The cognitive openness of social systems implies the possibility (indeed, high likelihood) that the consequences of juridical forms are felt at the level of the psychic and material conditions of human life. For the individual whose work relationship is classified as an “employee” some very tangible consequences will follow for their fiscal status and financial position. The interpenetration of juridical categories with social life is not confined, though, to those relations or transactions immediately affected by determinations of state officials. Through numerous effects including “bargaining in the shadow the law,” social relations are constituted and reconstituted by legal norms, to the extent that the coercive power of legal sanctions may remain more or less hidden from view.

This suggests a third aspect of legal forms, which is that they have a causal influence over the evolution of social structure. Law can be a causal as well as an outcome variable. This does not mean that the use of the law to bring about social change is straightforward. The success of legal techniques will often depend on how far legal norms can be aligned with or matched to collective practices beyond the legal system. Relatedly, the ability of the legal system to absorb and process information from other social systems will determine its effectiveness as an instrument of policy. The capacity of concepts to receive data from the external world while retaining the unity and coherence of taxonomical forms is directly in point here.

If legal forms have these constitutive and causal roles, what does this imply for our understanding of social structure more generally? As the examples given earlier show, legal texts are themselves a source of knowledge about the social world, particularly when they are studied in an historical perspective. This does not mean that that we can read off, from the existence of a legal concept, the existence of a corresponding entity in the external world. The drafter’s choice of a particular concept to frame a given statutory rule, such as “servant” or “employee,” is not made on the basis of an empirical observation of the social realm. Nor does the attribution by a judge of a term such as “employee,” to a particular set of preconditions for the application of a norm, in and of itself create a given social reality beyond the legal system. Yet both acts – the definition of a juridical concept and its application to a given factual context – presuppose at least a certain degree of connection between legal forms and the wider social reality of which they form a part. The set of juridical forms available to the drafter is framed by the long and complex process of coevolution which up to that point has shaped the relationship between the legal and economic systems. In the same way, the application of a legal concept to a given social or economic context is inevitably framed by the need for some level of effectiveness in the translation of norms into action. To observe a legal system in operation is to see part of the process by which a unique *social* reality, of which the law is a part, is brought into being.

References

- Ayres, Ian, and John Braithwaite. 1992. *Responsive regulation: Transcending the deregulation debate*. Oxford: Oxford University Press.
- Bikchandani, Sushil, David Hirshleifer, and Ivo Welch. 1992. A theory of fads, fashion, custom and cultural change as informational cascades. *Journal of Political Economy* 100: 992-1026.
- Biernacki, Rick. 1995. *The fabrication of labour: Britain and Germany, 1640-1914*. Berkeley: University of California Press.
- Brodie, Douglas. 1996. The heart of the matter. *Industrial Law Journal* 25 (2): 121-36.
- Cottareau, Alain. 2000. Industrial tribunals and the establishment of a kind of common law of labour in nineteenth century France. In *Private law and social inequality in the industrial age. Comparing legal cultures in Britain, France, Germany and the United States*, ed. Willibald Steinmetz, 203-26. Oxford: Oxford University Press.
- Cottareau, Alain. 2002. Droit et bon droit. Un droit des ouvriers instauré, puis évincé par le droit du travail (France XIXe siècle). *Annales HSS* 6 (novembre-décembre): 1521-57.
- Deakin, Simon. 1998. The evolution of the contract of employment 1900-1950: the influence of the welfare state. In *Governance, industry and labour markets in Britain and France. The modernising state in the mid-twentieth century*, ed. Noel Whiteside and Robert Salais, 213-30. London: Routledge.
- Deakin, Simon. 2001. The contract of employment: A study in legal evolution. *Historical Studies in Industrial Relations* 11: 1-36.
- Deakin, Simon. 2003. Evolution for our time: a theory of legal memetics. *Current Legal Problems* 55: 1-42.
- Deakin, Simon. 2006. The comparative evolution of the employment relationship. In *Boundaries and Frontiers of Labour Law*, ed. Guy Davidov and Brian Langille. Oxford: Hart.
- Deakin, Simon, and Fabio Carvalho. 2011. System and evolution in corporate governance. In *Law, economics and evolutionary theory*, ed. Peer Zumbansen and Galf-Peter Calliess, 111-30. Cheltenham: Edward Elgar.
- Deakin, Simon, and Gillian Morris. 2012. *Labour Law*, 6th. ed. Oxford: Hart.
- Deakin, Simon, and Frank Wilkinson. 2005. *The law of the labour market: Industrialization, employment and legal evolution*. Oxford: Oxford University Press.
- Didry, Claude. 2002. *Naissance de la convention collective. Débats juridiques et lutes sociaux en France au début du XXe siècle*. Paris: Éditions de l'EHESS.
- Freedland, Mark, and Nicola Kountouris. 2011. *The legal construction of personal work relations*. Oxford: Oxford University Press.
- Hay, Douglas, and Paul Craven, eds. 2004. *Masters, servants and magistrates in Britain and the Empire, 1562-1955*. Chapel Hill: University of North Carolina Press.
- Hepple, Bob. 1986. Restructuring employment rights. *Industrial Law Journal* 15: 69-83.
- Lawson, Tony. 2014. A conception of social ontology. In *Social ontology and modern economics*, ed. Stephen Pratten. London: Routledge.

- Luhmann, Niklas. 1984. *Soziale Systeme*. Frankfurt: Suhrkamp.
- Luhmann, Niklas. 1993. *Das Recht der Gesellschaft*. Frankfurt: Suhrkamp.
- Mansfield, Malcolm, Robert Salais, and Noel Whiteside, eds. 1994. *Aux sources du chômage 1880-1914*. Paris: Belin.
- Mnookin, Robert, and Louis Kornhauser. 1979. Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal* 88: 950-97.
- Mückenberger, Ulrich, and Alain Supiot. 2000. Ordre public social et communauté. Deux cultures du droit du travail. In *Le travail et la nation*, ed. Bénédicte Zimmermann, Claude Didry and Peter Wagner, 81-105. Paris: Éditions de la Maison des Sciences de l'Homme.
- Petit, Heloise, and Damien Sauze 2003. *Une lecture historique de la relation salariale comme structure de repartition des aléas. En partant du travail de Salais*. Paper presented to the colloquium, Conventions et institutions: approfondissements théoriques et contributions au debate politique, La Défense, 11-13 December 2003.
- Ross, Alf. 1957. Tû-tû. *Scandinavian Studies in Law* 1: 139-53.
- Ross, Alf. 1959. *On law and justice*. Berkeley: University of California Press.
- Sartor, Giovanni. 2009. The nature of legal concepts: inferential nodes and ontological categories. *Artificial Intelligence and Law* 17; EUI Working Paper No. 2007/08.
- Searle, John. 1995. *The construction of social reality*. London: Penguin.
- Searle, John. 2010. *Making the social world: The structure of human civilization*. Oxford: Oxford University Press.
- Simitis, Spiros. 2000. The case of the employment relationship: elements of a comparison. In *Private law and social inequality in the industrial age. Comparing legal cultures in Britain, France, Germany and the United States*, ed. Willibald Steinmetz, 181-202. Oxford: Oxford University Press.
- Sims, Vanessa. 2002. *Good faith in contract law: A comparative analysis of English and German law*. PhD diss., University of Cambridge.
- Supiot, Alain. 1994. *Critique du droit du travail*. Paris: PUF.
- Teubner, Guenter. 1989. *Recht als autopoietisches System*. Frankfurt: Suhrkamp.
- Veneziani, Bruno. 1986. The evolution of the contract of employment. In *The making of labour law in Europe*, ed. Bob Hepple, 45-50. London: Mansell.